## Before the FEDERAL COMMUNICATIONS COMMISSION Washington, DC 20554

| In the Matter of                            | ) |                      |
|---|---|----------------------|
|   | ) |                      |
| Policies Regarding Mobile Spectrum Holdings | ) | WT Docket No. 12-269 |

#### REPLY COMMENTS OF T-MOBILE USA, INC.

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T-Mobile USA, Inc. ("T-Mobile") hereby submits these reply comments in the abovereferenced proceeding. Most of the commenters agree with T-Mobile on four fundamental
points. *First*, meaningful spectrum aggregation limits are necessary in order to ensure that the
mobile wireless market is competitive. *Second*, there are material differences between the ability
to use spectrum above and below 1 GHz that require the Commission to separately evaluate a
carrier's spectrum holdings below 1 GHz. *Third*, the Commission should take targeted steps to
modify the current approach by which it reviews spectrum acquisitions in the context of both
auctions and transactions. *Finally*, while the Commission should establish clearer guideposts for
how it will evaluate the acquisition of spectrum in the secondary market, it must retain the
flexibility to evaluate transactions on a case-by-case basis to determine whether a transaction is
in the public interest.

Not surprisingly, the two largest spectrum holders dissent. They do not believe that there should be a separate evaluation of the valuable spectrum below 1 GHz, since they already hold the lion's share of these frequencies. Nor do they believe that the Commission should review multiple factors in evaluating spectrum acquisitions below a specified threshold. Instead, they would limit the Commission to a mechanical review of only the total amount of spectrum a

See Policies Regarding Mobile Spectrum Holdings, Notice of Proposed Rulemaking, WT Docket No. 12-269, FCC 12-119 (rel. Sept. 28, 2012) ("NPRM").

carrier holds, treating all spectrum bands as equal and using a "safe harbor" for spectrum acquisitions that do not exceed the spectrum screen, with no ability to consider other important competitive factors. While that approach would protect their own market position, it would frustrate the Commission's ability to promote the public interest and should be rejected.

#### I. INTRODUCTION AND SUMMARY

In its comments, T-Mobile explained that the Commission's rules should promote a competitive wireless marketplace by ensuring that all carriers have a meaningful opportunity to acquire spectrum to meet the skyrocketing demand for mobile broadband services. To this end, T-Mobile supported the Commission's proposal for bright-line limits on the acquisition of initial licenses through competitive bidding because it would provide certainty for bidders and administrative efficiency for the Commission. For acquisitions of spectrum in the secondary market, T-Mobile explained that the current case-by-case approach is more appropriate because it allows the Commission to evaluate competitive and marketplace issues relevant to a particular transaction. In either case, T-Mobile urged the Commission to separately evaluate a licensee's spectrum holdings below 1 GHz. He Commission to separately evaluate a licensee's

Most parties agreed with T-Mobile that an effective mobile spectrum holdings policy is important to fostering continued competition and choice for consumers.<sup>5/</sup> While the Commission

See Comments of T-Mobile USA, Inc., WT Docket No. 12-269, at 8-12 (filed Nov. 28, 2012) ("T-Mobile Comments").

See id. at 12-14.

See id. at 14-18.

See, e.g., Comments of Sprint Nextel Corporation, WT Docket No. 12-269, at 1 (filed Nov. 28, 2012) ("Sprint Comments") ("In carrying out its statutory duties in licensing and regulating spectrum use, the Commission must ensure that its policies governing access to this critical input promote competition, investment, and innovation."); Comments of MetroPCS Communications, Inc., WT Docket No. 12-269, at 2 (filed Nov. 28, 2012) ("MetroPCS Comments") ("[I]n the face of a severe spectrum crunch, enlightened spectrum policies now play a more significant role than ever as the Commission assesses the impact of proposed spectrum acquisitions on competition.").

must continue to pursue opportunities to make more spectrum generally available, the relative scarcity of spectrum compared to demand requires ongoing Commission oversight of spectrum holdings to prevent undue concentration. These parties also agreed that the Commission's review of spectrum holdings should account for the particular value of spectrum below 1 GHz. Finally, the comments provide support for T-Mobile's suggestion that band-specific limits may be appropriate in particular auctions and that the FCC has authority to impose them.

Many commenting parties suggested using a spectrum screen not only for transactions but also for auctions. T-Mobile continues to believe that spectrum caps are preferable in the auction context because of the certainty they provide to auction participants and to the Commission. Auction caps also do not inhibit auction participation. To the contrary, evidence suggests that caps encourage auction participation and potentially drive higher auction revenues.

Finally, T-Mobile agrees with other commenters that the Commission should provide additional certainty to the process of applying the spectrum screen in the case-by-case approach used to evaluate transactions. The spectrum included in the screen should be updated in a predictable and transparent manner outside of the proceedings evaluating the transactions themselves.

### II. AN EFFECTIVE MOBILE SPECTRUM HOLDINGS POLICY IS CRITICAL TO FOSTERING CONTINUED COMPETITION AND CHOICE FOR CONSUMERS.

Numerous commenters emphasize the need for more spectrum to meet the growing demand for capacity on mobile broadband networks. T-Mobile concurs. The FCC and the

See, e.g., MetroPCS Comments at 3; Comments of AT&T Inc., WT Docket No. 12-269, at 33 (filed Nov. 28, 2012) ("AT&T Comments").

See, e.g., Comments of the Computer and Communication Industry Association, WT Docket No. 12-269, at 1 (filed Nov. 28, 2012) ("CCIA Comments") ("In the face of accelerating consumer demand for wireless data and limited additional broadband spectrum, the Commission must ensure that non-dominant competitors have access to critical spectrum resources."); Comments of CTIA - The Wireless Association, WT Docket No. 12-269, at 1 (filed Nov. 28, 2012) ("CTIA Comments"); Comments of

Obama administration aim to make 500 megahertz of spectrum available for wireless broadband; however, it appears unlikely that the goal will be reached in the near term. As more spectrum becomes available, it may allow the Commission to relax its spectrum aggregation policies. With the future availability of significant new spectrum uncertain, however, the Commission must take steps now to promote an efficient, pro-competitive distribution of spectrum among providers.

Many commenters point to the market positions of the two largest carriers as further evidence of the need for clear and effective spectrum aggregation rules. For instance, the Computer and Communication Industry Association ("CCIA") argues that "AT&T and Verizon Wireless dominate the wireless market." Sprint Nextel Corp. ("Sprint") likewise urges the Commission to "reverse this trend and promote robust wireless competition by adopting more effective and more targeted spectrum aggregation rules and policies." 11/

The Commission's policies should reflect the reality that further spectrum concentration, particularly below 1 GHz, by the two largest carriers is a threat to the continued growth of competition in the wireless marketplace. As the Competitive Carriers Association ("CCA") notes, "[t]he Commission must recognize that control of the lion's share of prime broadband

Mobile Future, WT Docket No. 12-269, at 1-2 (filed Nov. 28, 2012) ("Mobile Future Comments") (arguing that the "demand for mobile services has grown exponentially in recent years", network operators require additional spectrum resources to respond this demand, and that the Commission should therefore ensure that "network operators will have access to this essential resource").

See, e.g., T-Mobile Comments at 4; see also Comments of T-Mobile USA, Inc., WT Docket No. 11-186, at 2-3 (filed Apr. 13, 2012).

See Connecting America: The National Broadband Plan, at xii, available at http://www.broadband.gov/download-plan/; White House Office of the Press Secretary, Presidential Memorandum: Unleashing the Wireless Broadband Revolution, § 1 (June 28, 2010), available at http://www.whitehouse.gov/the-press-office/presidential-memorandum-unleashing-wireless-broadband-revolution.

<sup>10/</sup> CCIA Comments at 1-3.

Sprint Comments at 3.

spectrum by one or two carriers makes it increasingly difficult for new entrants or other carriers to gain access to spectrum, . . . which in turn inhibits effective competition in the industry" and thereby harms consumers. 12/

### III. COMMENTERS AGREE THAT A TARGETED APPROACH IS NECESSARY FOR SPECTRUM BELOW 1 GHZ.

It is widely understood that the propagation characteristics of the spectrum below 1 GHz make it particularly valuable. Those characteristics allow for better coverage inside buildings and across larger geographic areas and provide higher spectral efficiency over a given area than higher-band spectrum. As a result, systems in lower-band spectrum are able to provide the same geographic coverage at a lower cost, making spectrum below 1 GHz more valuable from a competitive standpoint than spectrum above 1 GHz. The Commission itself has recognized this special value, which warrants a separate Commission evaluation of holdings below 1 GHz in auctions and transactions.

Numerous commenters agree. For example, Sprint notes that "[s]pectrum below 1 GHz has better intrinsic spectrum propagation than spectrum in higher bands and therefore provides signal coverage over larger geographic areas, including in adverse climate conditions and through difficult terrain, including rural areas." <sup>16/</sup> CCA likewise observes that "low-frequency spectrum is far more useful to new entrants in light of its importance for achieving coverage

Comments of the Competitive Carriers Association, WT Docket No. 12-269, at 6-8 (filed Nov. 28, 2012) ("CCA Comments").

See T-Mobile Comments at 15.

<sup>&</sup>lt;sup>14/</sup> See id.

See Application of AT&T Inc. and Qualcomm Incorporated for Consent to Assign Licenses and Authorizations, Order, 26 FCC Rcd 17589, ¶ 49 (2011) ("AT&T/Qualcomm Order").

Sprint Comments at 7.

efficiently,"<sup>17/</sup> and the Rural Telecommunications Group, Inc. ("RTG") notes that "spectrum below 1 GHz allows for better coverage across larger geographic areas." 18/ As Qualcomm has demonstrated, it costs over three times as much to construct a mobile wireless network using spectrum above 2 GHz as it does to construct a network using 700 MHz spectrum because of the difference in the number of base stations required. <sup>19/</sup>

Unfortunately, there is even more concentration of spectrum below 1 GHz than there is overall. As T-Mobile's initial comments pointed out, there is currently little lower-band spectrum left for assignment as spectrum holdings of below 1 GHz are concentrated in the hands of AT&T and Verizon Wireless, which together hold approximately 73 percent of the valuable spectrum below 1 GHz, measured on a MHz/POPs basis. 20/ Others concur. RTG reports that "in most counties . . . Verizon Wireless will control a combined 47 megahertz of spectrum below 1 GHz, which is approximately 35% of the available and usable 134 megahertz of spectrum below 1 GHz" and that "AT&T has more spectrum below 1 GHz because it generally holds a Cellular license, the Lower 700 MHz B and C Block licenses, and the non-paired Lower 700 MHz D Block license, and has a small holding of non-paired Lower 700 MHz E Block licenses."<sup>21/</sup> CCA asserts that AT&T and Verizon Wireless have been able "to aggregate vast amounts of beachfront spectrum across their respective nationwide footprints."<sup>22/</sup> Accordingly, just as an

<sup>17/</sup> 

CCA Comments at 7.

Comments of the Rural Telecommunications Group, Inc., WT Docket No. 12-269, at 8 (filed Nov. 28, 2012) ("RTG Comments").

See QUALCOMM Incorporated, Harmonization of the Digital Dividend: Perspectives from the Asia Pacific Region, at 6 (May 2011), available at http://www.itu.int/ITU-D/tech/events/2011/Broadcasting\_Hanoi\_May11/Presentations/Hanoi\_May11\_Session7\_Qualcomm.pdf.

See T-Mobile Comments at 14-16.

<sup>21/</sup> RTG Comments at 8-9.

<sup>22/</sup> CCA Comments at 2.

overall limit on mobile spectrum holdings is important to preserve the competitive landscape and benefit consumers, a limit on mobile spectrum holdings below 1 GHz is even more important.

Many commenters joined T-Mobile in proposing that the Commission adopt a different approach to evaluating those spectrum holdings. Sprint, for instance, suggests that the Commission should adopt a cap for spectrum below 1 GHz that would apply prospectively to both Commission spectrum auctions and secondary market transactions. RTG proposes that any individual licensee should be prohibited from holding more than 40 percent of suitable and available spectrum below 1 GHz at the county level. In addition, CCA suggests that the Commission should revise the spectrum screen by adopting an independent threshold for local spectrum holdings below 1 GHz – specifically arguing that the Commission should adopt a lower screen threshold of one-quarter of useable spectrum below 1 GHz in a given market. 25/

There are several approaches by which the Commission can, consistent with these views, take into account the difference between spectrum above and below 1 GHz. Some commenters support T-Mobile's proposal for a separate screen in transactions and cap in auctions for spectrum below 1 GHz. Other commenters suggest that the Commission weight various spectrum bands differently, so that the Commission can use a common percentage of spectrum

<sup>22</sup> 

See Sprint Comments at 4, 10-11.

See RTG Comments at 8-10.

See CCA Comments at 9, 11-12; see also CCIA Comments at 10-17 (asserting that the Commission should employ two separate spectrum screens – one for commercial mobile spectrum holdings below 1 GHz and another for all commercial mobile capable spectrum holdings).

See, e.g., CCIA Comments at 10-17, 21 (suggesting that the Commission utilize a separate spectrum screen for spectrum below 1 GHz and "leave open the option of adopting band-specific aggregation limits for specific auctions"); RTG Comments at 8-9 (adding that "[a] hard-and-fast percentage cap will help all parties when it comes to future incentive auctions for those frequencies in the DTV Band").

holdings to evaluate transactions and auctions.<sup>27/</sup> Importantly, both approaches proceed from the same view of the value of spectrum below 1 GHz and the Commission may wish to further evaluate using weighted values for assessing spectrum holdings. As noted below, the market in spectrum licenses reflects these differences in relative valuations through differences in the prices for spectrum in the various bands allocated for mobile services. These pricing data could be used to construct economically meaningful weightings for different bands. However, focusing on spectrum below 1 GHz and adopting a separate cap/screen for such spectrum (as well as an overall cap/screen) may be easier to administer than a policy that requires the Commission to assign weights to all available spectrum bands.

Not surprisingly, the two carriers with the dominant share of spectrum below 1 GHz argue strenuously against a policy that recognizes its unique value and assert that all spectrum is the same. AT&T, for instance, claims that the "data carrying" capacity of all spectrum is identical and that there is therefore no need to treat spectrum holdings below 1 GHz differently. AT&T is wrong. While "[i]n the abstract, 10 megahertz of spectrum in one band may be able to support the same amount of data as 10 megahertz in another band when a signal

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See, e.g., Sprint Comments at 4 (stating that the Commission should "revise its spectrum screen (which should similarly apply to licensed but not leased or sub-leased spectrum rights) to weight different bands according to estimates of their relative utility in the provision of mobile telephony/broadband services"); Comments for Public Knowledge, WT Docket No. 12-269 and WT Docket No. 11-186, at 5-14 (filed Nov. 28, 2012) ("Public Knowledge Comments") (observing that the Commission could consider weighting spectrum based on its technical properties or market values).

See, e.g., AT&T Comments at 9 (asserting that "[b]ecause the per MHz data-carrying capacity of a cell is the same for all of the relevant spectrum bands, the Commission's current spectrum screen correctly weighs all spectrum equally"); see also Comments of Verizon Wireless, WT Docket No. 12-269, at 29 (filed Nov. 28, 2012) ("Verizon Comments") (adding that there is "no inherent comparative value between high- and low-band spectrum . . . because that value varies carrier to carrier and over time depending on the optimal mix of services and coverage it wants to achieve"); Mobile Future Comments at 13 ("[N]o band is always superior – nor inferior – to others.").

AT&T Comments at 62-69; *see also* Supplemental Reply Comments of AT&T, WT Docket No. 11-186, at 5 (filed Apr. 30, 2012) ("The data-carrying capacity of all spectrum . . . is equal: 20 MHz of AWS spectrum can carry as much wireless broadband data traffic as 20 MHz of 700 MHz.").

leaves an antenna . . . the relevant inquiry is how much data a *system* designed with particular bands of spectrum can carry."<sup>30/</sup> A carrier's ability to deliver data to customers over a geographic area using multiple-site architecture is dependent on propagation and other factors, many of which are band-dependent, and so systems designed for different bands can carry varying amounts of overall data.<sup>31/</sup>

It is simply not the case that a megahertz equals a megahertz.<sup>32/</sup> As Sprint explains, "[c]ommercial spectrum bands differ from one another in numerous technical, operational, and regulatory aspects including signal propagation, available of network equipment and consumer handsets, size and contiguity of spectrum blocks, availability of paired bands for uplink and downlink transmissions, technical restrictions (*e.g.*, guard bands, power limits), cost of clearing incumbents, and need for coordination or other complex negotiations with other licensees."<sup>33/</sup> The Commission's "weigh[ing] all spectrum equally . . . [is a] simplistic method [that] ignores the large differences in value and utility between bands like 700 MHz and BRS."<sup>34/</sup>

Letter from Steven K. Berry, President and CEO, RCA-The Competitive Carriers Association, to Ms. Marlene H. Dortch, Secretary, FCC, WT Docket No. 11-186, at 8 (filed May 24, 2012) ("RCA Letter").

Id. ("Therefore, it is simply not true that the 'data-carrying' capacity of systems using different spectrum bands is equal.").

Sprint Comments at 6; see also Public Knowledge Comments at 3 ("[T]he maximum data-carrying capacity of a 20 MHz point-to-point link is generally much greater in the 700 MHz band than in the higher-frequency AWS band, as long as there is no change in distance between transmitter and receiver, antenna gains, transmit power, and interference level."). The Commission has recognized the same general point. See Annual Report and Analysis of Competitive Market Conditions with Respect to Mobile Wireless, Fifteenth Report, 26 FCC Rcd 9664, ¶ 290 (2011) ("Two licensees may hold equal quantities of bandwidth but nevertheless hold very different spectrum assets.").

Sprint Comments at 6.

Comments of Free Press, WT Docket No. 12-269, at 11 (filed Nov. 28, 2012); *see also* Comments of the Writers Guild of America, West, Inc., WT Docket No. 12-269, at 9 (filed Nov. 28, 2012) ("For example, lower frequency spectrum is the most valuable spectrum available for mobile broadband use because it allows signals to travel longer distances, penetrate buildings and requires fewer cell towers. A cell tower in the lower 700 MHz range will cover 100 meters whereas four towers are required to cover 100 meters in the higher 1.9 GHz range.").

Assertions from AT&T, Verizon Wireless, and Mobile Future that all spectrum is the same (or should be treated the same because the value of spectrum is different to each carrier) is also sharply contradicted by the price that carriers have been willing to pay for spectrum, both domestically and internationally. In the Commission's auction of 700 MHz spectrum, the average MHz/POP for two-way paired spectrum was \$1.11 to \$1.28 per MHz/POP. On the other hand, in the initial auctions of personal communications service ("PCS") in March 1999 and advanced wireless service ("AWS-1") spectrum in September 2006, the average MHz/POP paid was \$0.52 per MHz/POP and \$0.53 to \$0.54 per MHz/POP, respectively.

AT&T misses the point when it argues that the combined spectrum and deployment costs of low-band and high-band networks are "equalized."<sup>37/</sup> Certain propagation characteristics of low-band spectrum, such as in-building penetration and efficient coverage of rural areas, simply cannot be replicated at higher bands even if carriers are willing to make the additional investments required to deploy systems in those bands. The need for more transmitters at higher bands also imposes delays and other tangible and intangible costs associated with obtaining additional siting approvals from multiple jurisdictions that licensees in

See Jeremy Bulow, et al., Winning Play in Spectrum Auctions, at 28 (Feb. 2009) ("Bulow Paper"), available at http://www.stanford.edu/~jdlevin/Papers/AWS.pdf.

See Thomas W. Hazlett, U.S. Wireless License Auctions: 1994-2009, at 13 (July 14, 2009) ("Hazlett Paper"), available at http://iep.gmu.edu/wp-

content/uploads/2009/07/Hazlett\_WirelessLicensesAuctions19942009.pdf; Joe Lawrence, Vice President, Marketing, CDMA Development Group, *AWS Overview*, at 11 (Oct. 9, 20117) ("AWS Overview"), *available at* 

http://www.cdg.org/news/events/cdmaseminar/07\_NARC/Tues/Lawrence\_1110%20AWS%20Overview.pdf; Bulow Paper at 28.

See AT&T Comments at 9 ("To the extent it costs more to deploy higher-band spectrum (and all else is equal), higher-band spectrum will fetch lower prices, equalizing the costs of low band and high band networks. Given that marketplace valuations already reflect any such cost differences, it would make no economic sense for the Commission to count those market differences again in its spectrum screens – effectively forcing the holders of low-band spectrum to pay twice and artificially restricting the ability of such carriers to obtain needed spectrum.").

lower bands can avoid. More generally, all carriers should have the flexibility to obtain the mix of spectrum that they believe best effectuate their deployment and service plans.<sup>38/</sup> Among the four national carriers, only AT&T and Verizon Wireless have any significant spectrum holdings below 1 GHz. T-Mobile has virtually no such spectrum and Sprint has some holdings (about 14 megahertz) in the 800 MHz band. The Commission should not allow the spectrum below 1 GHz to become the preserve of the two large legacy carriers, who after all obtained their initial holdings in those frequencies by government fiat and without charge.

### IV. OBJECTIONS TO A SPECTRUM CAP ARE NOT VALID IN THE AUCTION CONTEXT.

As noted above, T-Mobile proposes that the Commission adopt a cap in the auction context. Some commenters do not distinguish between auctions and secondary market transactions when they address the Commission's approach to mobile spectrum holdings – they advocate for continued use of the current case-by-case approach with spectrum screens. Other commenting parties simply oppose the use of a cap. However, particularly in auctions, the use of caps is appropriate.

In secondary market transactions, the Commission must retain the flexibility to consider a variety of market conditions, as it has in the past.<sup>41/</sup> As Clearwire explains, a flexible case-by-

See RCA Letter at 10 ("RCA and T-Mobile are not concerned with pricing of spectrum in the marketplace. Rather the FCC must factor spectrum value when considering limits on aggregation of spectrum – whether in the secondary market or directly from the FCC.").

See, e.g., Comments of Clearwire Corporation, WT Docket No. 12-269, at 1 (filed Nov. 28, 2012) ("Clearwire Comments"); MetroPCS Comments at 16-17 (asserting that the Commission should retain a modified case-by-case and spectrum screen approach to evaluate spectrum enhancing situations, including secondary market transactions, auctions and leases).

See, e.g., CTIA Comments at 8-9; Comments of United States Cellular Corporation, WT Docket No. 12-269 (filed Nov. 28, 2012) ("USCC Comments"); Comments of the Telecommunications Industry Association, WT Docket No. 12-269, at 1-2 (filed Nov. 28, 2012).

See, e.g., Applications of AT&T Inc. and Centennial Communications Corp. for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Leasing Arrangements, Memorandum

case approach "allows the Commission to look at the characteristics of the specific market areas at issue as it weighs the public interest benefits of a proposed transaction." MetroPCS Communications, Inc. ("MetroPCS") similarly notes that "[t]he case-by-case approach allows the Commission to take into consideration the current market conditions in making its assessment of whether to approve the transaction." Accordingly, T-Mobile agrees that a case-by-case approach is appropriate for secondary market transactions; the Commission should be able to consider many factors in determining if a transaction is pro-competitive.

Conversely, the use of a spectrum screen may impede the efficient operation of, and participation in, auctions. As NTCH, Inc. points out, caps provide certainty in an auction, and certainty promotes additional participation and competition. A cap enables each auction participant to know at the outset how much spectrum it could retain if it is successful. The certainty of knowing that other entrants are bound by the same cap may also encourage broader participation in an auction. The alternative to caps – post-auction divestitures to bring a carrier's holdings within a screen under a case-by-case approach – is not an effective substitute for preauction eligibility rules. Competitors may exceed a screen in an auction with the hope of

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Opinion and Order, 24 FCC Rcd 13915, ¶¶ 54-74 (2009) (evaluating, for each of the markets identified by the screen as needing further analysis, whether there would be an increased likelihood of unilateral effects or coordinated effects as a result of a transaction); *Applications of Cellco Partnership d/b/a Verizon Wireless and Atlantis Holdings LLC for Consent to Transfer Control of Licenses, Authorizations, and Spectrum Manager and De Facto Transfer Leasing Arrangements and Petition for Declaratory Ruling that the Transaction is Consistent with Section 310(b)(4) of the Communications Act,* Memorandum Opinion and Order and Declaratory Ruling, 23 FCC Rcd 17444, ¶ 159 (2008); *see also Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation, et al.*, Memorandum Opinion and Order, 19 FCC Rcd 21522 (2004) (analyzing vertical issues as well).

Clearwire Comments at 4.

<sup>43/</sup> MetroPCS Comments at 8.

See Comments of NTCH, Inc., WT Docket No. 12-269, at 1-3 (filed Nov. 28, 2012) ("NTCH Comments").

convincing the Commission that they should be able to retain the spectrum later. By contrast, a bright-line cap would provide a disincentive for auction participants to engage in that behavior. 45/

Post-auction divestitures under a case-by-case approach may also undermine the Commission's pro-competitive goals. Divestitures will likely involve less valuable spectrum than the frequencies made available for auction. That is particularly true if the auctions enable the largest carriers to increase their holdings of the attractive spectrum below 1 GHz, where their holdings are already significantly concentrated, in exchange for divesting less valuable spectrum. Divestitures under a case-by-case approach will not necessarily be open to all potential competitors. In fact, the spectrum divested by one of the big two may even find its way to the other one that does not prevail in the auction.

Contrary to AT&T's assertions, upfront caps will neither "result in an inefficient allocation of spectrum" nor "cost the Treasury significant lost revenue." If anything, the absence of such limits will likely deter broad participation by enabling the largest carriers to dominate an auction – and potentially enabling them to prevail in an auction at a lower price than they would have paid in a more competitive auction. In fact, experience demonstrates that spectrum aggregation rules do not reduce auction revenues. In the initial PCS auction, which featured spectrum caps, there was more bidding, adjusted for the number of licenses auctioned, than either subsequent auction for initial AWS-1 licenses or 700 MHz auctions, neither of which contained spectrum caps. The prices paid for spectrum in the initial AWS-1 auction

Of course, the Commission would have the discretion to waive its rules under appropriate circumstances. However, in order to ensure the certainty in the auction process discussed above, the Commission should set the bar high for waivers of a spectrum cap in an auction.

AT&T Comments at 33.

The length of an auction is one sign of its competitiveness. In the PCS auction, the ratio of rounds to licenses was 112 rounds to 99 licenses, or 1.13. In the AWS-1 and 700 MHz auctions, the ratios were 0.15 and 0.24, respectively. *See* FCC, Auction 4: Broadband PCS A and B Block,

– with no spectrum limit – were no different from the PCS auction, which had a spectrum limit.  $^{48/}$ 

Even if there were evidence to support AT&T's contentions, consideration of its premise – that caps would depress auction prices – as a basis for auction design is contrary to the Communications Act. Section 309(j)(7) of the Act specifically prohibits the Commission from basing auction rules "solely or predominantly on the expectation of Federal revenues." Rather, the Act directs the Commission to design auctions to promote the deployment of new products and services, economic opportunity, competition, and the dissemination of licenses "among a wide variety of applicants." These goals would be furthered by spectrum caps that allow all carriers to have a meaningful opportunity to participate in future auctions.

MetroPCS asserts that spectrum caps would frustrate the "dynamic" nature of the wireless industry, <sup>51/</sup> but that is not the case for caps limited to the auction context. Even in the auction context, the Commission's implementation of a cap could reflect market conditions. In advance of each auction, for instance, the Commission typically conducts a rulemaking to determine the band plan and other rules governing the conduct of the auction. In such a proceeding, the Commission could determine whether a cap was appropriate for that auction and

http://wireless.fcc.gov/auctions/default.htm?job=auction\_summary&id=4 (last visited Jan. 6, 2013); FCC, Auction 66: Advanced Wireless Services (AWS-1),

http://wireless.fcc.gov/auctions/default.htm?job=auction\_summary&id=73 (last visited Jan. 6, 2013).

http://wireless.fcc.gov/auctions/default.htm?job=auction\_summary&id=66 (last visited Jan. 6, 2013); FCC, Auction 73: 700 MHz Band,

The average price per MHz/POP was approximately \$0.52 per MHz/POP for the PCS auction and \$0.53-\$.054 MHz/POP for the AWS-1 auction. *See* Hazlett Paper at 11; AWS Overview at 11; Bulow Paper at 28.

<sup>&</sup>lt;sup>49/</sup> 47 U.S.C. § 309(j)(7)(B).

Id. § 309(j)(3)(A)-(B).

See MetroPCS Comments at 7-8 (claiming that a spectrum cap "is not suited to the dynamic, ever-changing wireless marketplace").

if so the specific conditions of the cap and how it would be applied to the spectrum being made available as well as in the context of overall spectrum holdings. By choosing from among these tools for each auction, the Commission would be able to tailor its policy to the market conditions at the time.

Finally, as T-Mobile explained in its initial comments, band-specific spectrum limits are well within the Commission's authority to "adopt and enforce rules of general applicability, including rules concerning spectrum aggregation that promote competition." Band-specific limits would apply to all potential bidders in the auction. Although such limits might affect only a few parties, a rule need not have "industry-wide" effect in order to be considered generally applicable. Congress preserved the Commission's jurisdiction to adopt "rules of general applicability that would limit the ability of any carrier that already has significant spectrum holdings to dominate future spectrum auctions."

## V. THE FCC SHOULD PROVIDE MORE CERTAINTY WITH RESPECT TO THE IMPLEMENTATION OF THE SPECTRUM SCREEN.

Virtually all commenting parties that support retaining the current screen in the context of the Commission's case-by-case approach recommend modifications so that the use of the screen is more predictable. T-Mobile agrees with those parties who suggest that the spectrum included in the screen should be updated from time-to-time, but not in the context of specific

Sprint Comments at 2 (adding that the Commission "retains the authority to limit the amount of spectrum a carrier can acquire in an auction by band, geography or in total"); *see also* CCIA Comments at 21 (suggesting that "[t]he Commission should leave open the option of adopting band-specific aggregation limits for specific auctions").

T-Mobile Comments at 11 (citing *NPRM* ¶ 21; 47 U.S.C. § 309(j)).

<sup>53/</sup> See T-Mobile Comments at 11-12.

See, e.g. MetroPCS Comments at 7 ("[T]he Commission's current case-by-case approach is appropriate, but needs to be modified."); Sprint Comments at 11-13; Verizon Comments at 3 (suggesting that the Commission "update the spectrum screen framework").

transactions, which is the Commission's current approach.<sup>56/</sup> First, the Commission should update the spectrum screen every time it makes another spectrum band available for mobile wireless services or it materially modifies its rules so that the utility of a particular spectrum band for mobile wireless use is increased or decreased.<sup>57/</sup> Second, it should undertake a rulemaking periodically, for example, biannually, in order to assess which spectrum should be included in the screen.<sup>58/</sup> The latter approach will ensure that spectrum not otherwise subject to a separate rulemaking does not remain included or excluded in the spectrum screen simply through inertia.

T-Mobile also agrees that the Commission should refine its criteria for determining whether spectrum should be included in the screen.<sup>59/</sup> Spectrum should only be included in the

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See, e.g., Sprint Comments at 14 ("The Commission should periodically review the spectrum included in its screen and cap and revise it as necessary to accurately and effectively prevent excessive aggregation that could enable a carrier to exercise market power and thereby restrain or forestall continued competition for the benefit of wireless consumers."); CTIA Comments at 6 ("The Commission should also update the spectrum included in the spectrum screen denominator at regular benchmarks to take into account changes in the spectrum available for mobile services."); MetroPCS Comments at 3 ("[R]ather than modifying the screen on an *ad hoc* basis in the context of each major acquisition, the spectrum screen should be revisited in each rulemaking proceeding in which the quantity of spectrum available for broadband use in the near term is materially affected.").

See CTIA Comments at 6 (noting that the update "could occur when rules are adopted or licenses modified to allow mobile services, in which case the Commission should seek comment on the inclusion of a particular spectrum band when it first proposes rule changes or a license modification to allow mobile services"); USCC Comments at 4 (stating that "spectrum should certainly be regularly added to the 'denominator" of the wireless spectrum screen when it becomes available to carriers for commercial use" and that "when spectrum ceases to be available for commercial and/or broadband use . . . it should be removed from the screen denominator").

See CCIA Comments at 2 (asserting that the Commission "will need to periodically update both spectrum screens to reflect changing allocations, technical rules, and market dynamics that make different spectrum useful for broadband services"); USCC Comments at 4 (arguing that the Commission should update the screen at least every two years).

See, e.g., CCA Comments at 15 ("[T]he Commission should adopt a clear and predictable mechanism for incorporating additional bands"); AT&T Comments at 4 (asking the Commission to "update the screen to include all of the available spectrum that is 'suitable' for mobile wireless services"); Comments of the Communications Liberty and Innovation Project, WT Docket No. 12-269, at 12 (filed Nov. 28, 2012) (suggesting that the FCC should ensure that all spectrum that is actually used to provide

AWS-1 is a good example of spectrum that was appropriately excluded from the screen for a period of time since it was not available for use when it was first licensed. A periodic review of the spectrum that should be included in the screen, as suggested above, will allow the Commission to determine when spectrum is sufficiently available to be included in the screen.<sup>60/</sup>

In addition to adding clarity about which spectrum should be included in the screen and the criteria for adding spectrum, T-Mobile agrees with other commenters that affected parties and the public would benefit from greater certainty in how the screen is applied. T-Mobile agrees, as MetroPCS suggests, that the burden of proof should be on the proponents to demonstrate the pro-competitive nature of a transaction for any markets that would result in spectrum holdings in excess of the screen. MetroPCS lists some, but not necessarily all of the factors that the Commission should take into account when determining whether a party has

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mobile services and compete in the mobile market is included in its spectrum aggregation analyses and in the one-third benchmark).

See, e.g., AT&T Comments at 35 (suggesting that the Commission should "commit to making any appropriate adjustments to the screen on an annual basis"); Verizon Comments at 18 ("[T]he Commission should regularly update its spectrum screen when new spectrum becomes suitable and available for mobile telephony/broadband services.").

See, e.g., Clearwire Comments at 5 (pointing out that "changes to the manner in which the spectrum screen is administered . . . could provide a greater degree of certainty to wireless carriers contemplating the acquisition of spectrum assets"); CTIA Comments at 6 ("[T]he Commission should apply the screen consistently across all transactions.").

See MetroPCS Comments at 4 (explaining that "there should be a rebuttable presumption that competitive harm exists if the spectrum screen is exceeded" and that "[p]otential spectrum-acquiring parties should have the burden of proof to rebut this presumption and demonstrate that their acquisition of spectrum over the screen will not result in competitive harm, and is in the public interest"); see also CCA Comments at 16-17 (suggesting that "the applicant would be allowed to proceed with the transaction in those markets *only* if it could rebut the presumption of anticompetitive effects by showing, based on a preponderance of the evidence, that the transaction would benefit competition and advance the public interest").

satisfied its burden of proof.<sup>63/</sup> Regardless of whether the screen is triggered in any of the markets in the transaction, the Commission should continue to review transactions using a public interest analysis that takes account whatever other information is relevant in the transaction.<sup>64/</sup>

By contrast, the "safe harbor" test proposed by Verizon Wireless and AT&T would deprive the Commission of the ability to evaluate the competitive impact of a secondary market transaction. While the Commission and affected parties need guideposts under which transactions will be evaluated, those guideposts should not unduly restrict the Commission's evaluation of whether a transaction is in the public interest. A safe harbor approach that limits the Commission's focus to the acquirer's holdings in those markets where a transaction exceeds

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See MetroPCS Comments at 4 (recommending "several factors the Commission should consider while evaluating such rebuttals, including the effect on competition, the extent to which the proposed acquirer is using its existing spectrum resources efficiently, and the nature of the participant's spectrum holdings and uses"); see also CCA Comments at 17 (submitting that factors should include, among other things, "promoting and preserving wireless competition; the applicant's purported need for the spectrum in order to meet unusually high demand in areas where other wireless carriers have not deployed; whether the applicant has shown that it exhausted other, less competitively harmful options to meet consumer demand in a particular market; the particular spectrum band that is the subject of the proposed transaction, including any technical or marketplace characteristics of the band that are relevant to the Commission's competitive analysis; or whether the applicant has shown that the aggregation of spectrum in a particular band poses no competitive concerns in a given market").

See MetroPCS Comments at 17 (urging "the Commission to continue to conduct its searching public interest analysis of other aspects of a proposed acquisition" and that "[t]he fact that a particular transaction does not require further analysis pursuant to the spectrum screen does not mean that the transaction is otherwise in the public interest"). Even though the Commission must have the freedom to undertake the statutorily required public interest analysis, T-Mobile does not support TechFreedom's "rule of reason" approach, which would reduce the additional certainty that most commenting parties prefer. See Comments of Matthew Star, Legal Fellow, et al., TechFreedom, WT Docket No. 12-269, at 9-11 (filed Nov. 28, 2012).

See AT&T Comments at 3, 54-55 (requesting that the Commission "reaffirm" that it "will not entertain spectrum aggregation-related challenges to any proposed spectrum acquisition that does not exceed the safe harbor level"); Verizon Comments at 5-11 (claiming that "the Commission must restore the spectrum screen's intended function as a safe harbor so that applicants will not be subjected to further spectrum-related review in below-screen markets").

the screen<sup>66/</sup> could preclude the Commission from more broadly evaluating whether the transaction as a whole would lead to undue concentration of spectrum holdings.

A safe harbor could also shield acquirers from the Commission's consideration of other factors that may be relevant to a transaction. This restrictive approach is contrary to the Commission's statutory obligation to consider a range of factors to ensure that a transaction is in the public interest even when the screen is not exceeded.<sup>67/</sup> The Commission should retain the discretion to analyze all factors relevant to a transaction and to fashion other transaction-specific relief as appropriate even when the screen is not triggered.

#### VI. CONCLUSION

The comments demonstrate overwhelming agreement that as the demand for capacity on mobile broadband networks continues to accelerate, the Commission must revise its mobile spectrum policies to ensure that all carriers have equitable access to critical spectrum resources through both auctions and secondary market transactions. The Commission can achieve this by

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See AT&T Comments at 56-57.

See, e.g., Applications of Cellco Partnership d/b/a Verizon Wireless and SpectrumCo LLC and Cox TMI, LLC for Consent to Assign AWS-1 License Applications of Verizon Wireless and Leap for Consent to Exchange Lower 700 MHz, AWS-1 and PCS License Applications of T-Mobile License LLC and Cellco Partnership d/b/a Verizon Wireless for Consent to Assign Licenses, Memorandum Opinion and Order and Declaratory Ruling, 27 FCC Rcd 10698, ¶ 47 (2012) ("The Communications Act requires the Commission to examine closely the impact of spectrum aggregation on competition, innovation, and the efficient use of spectrum in order to ensure that any transfer of control serves the public interest, convenience, and necessity. Our public interest analysis must consider not only the near-term, but also the long-term, impacts of the proposed transactions . . . ");  $AT\&T/Qualcomm\ Order\ \P\ 30$  (discussing the Commission's public interest review and noting "[o]ur goals relating to spectrum concentration include discouraging anticompetitive conduct and ensuring that incentives are maintained for innovation and efficiency in the mobile services marketplace"); Applications Filed by Frontier Communications Corporation and Verizon Communications, Inc. for Assignment or Transfer of Control, Memorandum Opinion and Order, 25 FCC Rcd 5972 (2010) (joint statement of Commissioners Copps and Clyburn) (approving the transaction and stating "... we must also consider the financial viability of the acquiring company, the effect of the transaction on customers, the transition of operations from one company to another, the continuity of E911 services and the impact on jobs. It is our statutory duty to weigh the potential benefits and the potential harms of this transaction in determining whether it serves the public interest").

adopting T-Mobile's proposals to institute bright-line spectrum caps on spectrum holdings in the auction context while continuing to use its case-by-case approach for secondary market transactions, and apply a separate cap/screen analysis to holdings of the especially valuable spectrum below 1 GHz.

Respectfully submitted,

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